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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DENNIS ASHTON CRAWFORD, Appellant.	2 CA-CR 2008-0328 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071574

Honorable Hector E. Campoy, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Dennis Crawford was convicted of two counts of armed robbery, one count of robbery, two counts of kidnapping, one count of aggravated assault, one count of attempted sexual assault, five counts of sexual assault and two counts of sexual

abuse. The trial court sentenced him to a combination of concurrent and consecutive terms of imprisonment totaling 82.25 years.[1] On appeal, Crawford argues the trial court erred in denying his motion to suppress evidence obtained as a result of a warrantless entry into his grandmother's backyard and in failing to suppress evidence obtained pursuant to a warrant during a later search of the grandmother's residence. Crawford also contends the court erred in denying his motion to sever certain counts and in denying his challenge of the state's exercise of a peremptory strike to excuse a Hispanic juror. Because the trial court did not err, we affirm.

[1]Crawford calculates his total sentence to be sixty-three years. The state asserts the sentence is "several decades." We calculate the sentence as follows. In its oral pronouncement of sentence and in its sentencing minute entry, the trial court did not state whether the sentences for counts one, two and three were to be served consecutively to or concurrently with each other. The court did state in its minute entry, however, that counts one through three would all "date from September 19, 2008." Based upon the language in the minute entry, we presume the trial judge intended counts one through three to be served concurrently with each other.

The trial court also states in its oral pronouncement of sentence that counts four and five are to be served consecutively to counts one through three. The sentencing minute entry, however, states that the terms on count five is consecutive to the terms on counts one, two and three, but is silent about whether count four will run consecutively or concurrently. The oral pronouncement of sentence controls when different from the written minute entry. *See State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999). We therefore presume the court intended counts four and five to be concurrent with each other but consecutive to the terms on counts one through three.

Finally, we note that both the oral pronouncement of sentence and sentencing minute entry state that counts six through ten are to be served consecutively to each other and that the term on count six is consecutive to the terms on counts four and five. We presume the trial court intended the terms on counts six through ten to be consecutive to each other and to the terms on counts four and five and for the terms on counts four and five to be consecutive to each other and to the terms on counts six through ten.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions."[2] *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). On April 11, 2007, Crawford entered a convenience store with a gun and demanded money from the cashier, D. He returned to the same gas station on April 15 and again demanded cash. After D. gave him money, Crawford informed her that he was going to rape her. D. managed to escape, however, and called police.

¶3 Several hours later, Crawford entered a different convenience store and informed the clerk there, A., that he had a weapon and would shoot her if she did not obey him. Crawford then ordered A. to leave the store and took her to a nearby house, which was later determined to belong to his grandmother. Crawford entered the backyard of the house through a gate and raped A. several times in the yard. He then rinsed A.'s body with a hose, took her to a nearby store, forced her to climb into a dumpster, and left. A. then climbed out of the dumpster and flagged down a passerby who helped her contact police.

Motions to Suppress

¶4 Crawford contends the trial court erred in denying his motion to suppress evidence obtained as the result of a warrantless police entry onto his grandmother's property. Crawford also claims the trial court erred in denying his motion to suppress evidence seized pursuant to a warrant during a subsequent search of his grandmother's home.

[2]The statement of facts in Crawford's opening brief is approximately fifteen pages long and replete with redundant and unnecessary detail. We remind counsel that the statement of facts need only include facts "relevant to the issues presented for [our] review," *see* Rule 31.13(c), Ariz. R. Crim. P., and need not contain superfluous, repetitive material.

¶5 When examining a ruling on a motion to suppress, we review the trial court's factual findings for an abuse of discretion, but we review de novo the ultimate legal question whether the evidence was obtained in violation of the constitution. *State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004). We consider only the evidence presented at the suppression hearing, *State v. Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d 833, 840 (2006), which, we view in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). "[W]e do not impose our own determination as to the credibility of witnesses" and instead "defer to the trial court's assessment of witness credibility because the trial court is in the best position to make that determination." *State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007). We also infer any findings necessary to affirm the trial court, provided such implicit findings are consistent with any express findings of fact the court made. *State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009).

Warrantless Entry

¶6 Crawford first argues the trial court erred in finding that exigent circumstances justified the warrantless entry into, and search of, his grandmother's back yard and in denying his motion to suppress evidence obtained as a result. On the night of the attack, A. informed police that "she was willing to [take them to the] general area [where] . . . the attack had taken place." Officers on the scene requested that an officer with a trained police dog accompany A. Officer Chris Fenoglio and his dog, Ditka, responded and traveled with A. and another officer to "a general area . . . where [the attack] may have occurred." A. informed the officers that the attack had taken place at a particular house. Fearing that the perpetrator might attempt to destroy evidence of the crime, Officer Fenoglio leashed Ditka and walked up the driveway. Ditka began

to pull Officer Fenoglio towards a gate leading to a fenced yard. Officer Fenoglio opened the gate and entered the yard.

¶7 Ditka continued to pull on his leash—triggering Officer Fenoglio's "spidy senses" that a person might be present in the yard. Officer Fenoglio then spotted Crawford in a sleeping bag on the backyard patio. More officers entered the yard, handcuffed Crawford, and escorted him out of the yard to a waiting patrol car.

¶8 "In order for a warrantless search to be lawful it must be based on 'probable cause.'" *State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974). Nevertheless, even if police have probable cause to conduct a search of a home, they still may not enter it without a warrant unless there are exigent circumstances.[3] *See State v. Soto*, 195 Ariz. 429, ¶ 8, 990 P.2d 23, 25 (App. 1999). Exigent circumstances have been defined to include "'hot' pursuit, the probability of the destruction of evidence, the possibility of violence . . . or a substantial risk of harm to the persons involved or to the law-enforcement process if officers must wait for a warrant." *Id*. "While '[m]ere incantation of the phrase, "exigent circumstances," will not automatically validate a warrantless search' if there are articulable and particularized facts evidencing an exigency, a warrantless search is justified." *State v. Stein*, 153 Ariz. 235, 238, 735 P.2d 845, 848 (App. 1987), *quoting People v. Barndt*, 199 Colo. 51, 55, 604 P.2d 1173, 1175 (1980) (alteration in *Stein*) (citation omitted).

¶9 Crawford first contends Officer Fenoglio's entry into the yard was not supported by exigent circumstances because A. was unsure which house was the one where the attack had occurred. But the issue of A.'s level of certainty about which house had been the scene of the

[3]The state stipulated at trial and concedes on appeal that Crawford had standing to challenge the entry into his grandmother's yard and that the yard constituted protected curtilage and should therefore be given the same Fourth Amendment protections as a house.

attack does not involve the existence of exigent circumstances but rather the existence of probable cause to search the backyard. "Probable cause to search is information sufficient to justify a belief by a reasonable person that an offense has been or is being committed and that items connected with that crime will be found in the place the officer proposes to search." *State v. Swanson*, 172 Ariz. 579, 585, 838 P.2d 1340, 1346 (App. 1992) (citation omitted). And Crawford does not argue on appeal, nor did he argue below, that Officer Fenoglio lacked probable cause. We therefore need not consider whether he had probable cause here. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to sufficiently argue claim on appeal constitutes abandonment of the claim); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (failure to argue issue below forfeits all but fundamental error review; failure to argue fundamental error on appeal waives issue). In any event, A. testified at a prior hearing, which the judge incorporated into the suppression hearing, that she had been certain she identified the correct house. And A.'s comments at the suppression hearing, as well as the transcript of the radio communications between the officers, including statements by A. about the house, lent support to the trial court's findings. Accordingly, despite any equivocations on which Crawford relied, the evidence at the hearing, taken in the light most favorable to sustaining the trial court's decision, supports a finding of probable cause to the extent it is challenged on A.'s alleged uncertainty about the correct location of the assault. *See Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d at 790 (we view evidence in light most favorable to sustaining trial court's decision).

¶10 Crawford also argues, however, that Officer Fenoglio's entry was not supported by exigent circumstances because a detective at the scene testified that officers "do not expect a suspect to return" to the scene of a crime. But Officer Fenoglio testified that he had entered the

yard because he feared the perpetrator was nearby and might destroy evidence. It is the province of the trial court to determine whether the detective or Officer Fenoglio's testimony was more credible. *See Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d at 230. And the probability that evidence will be destroyed qualifies as an exigent circumstance. *Soto*, 195 Ariz. 429, ¶ 8, 990 P.2d at 25. Crawford claims in his reply brief, however, that it was unreasonable for Officer Fenoglio to conclude that he might have been destroying evidence "45 minutes" after the victim had contacted the police. But many pieces of evidence existed to implicate Crawford and the trial court could have concluded it was reasonable for the officer to believe that Crawford may have been attempting to destroy or dispose of various types of evidence such as the weapon he used to threaten A., the clothes he wore while committing the attack and the sleeping bag he used in the attack. Even if Officer Fenoglio did not know exactly what evidence might have existed, the trial court could have concluded that he acted reasonably in believing that some evidence existed that could be destroyed.[4] The trial court did not abuse its discretion or err in denying Crawford's motion to suppress evidence obtained as a result of Officer Fenoglio's warrantless search of the yard.

Search Warrant

¶11 Crawford next challenges the validity of a search warrant authorizing police to search his grandmother's home. He claims that the affidavit made in support of the warrant contained materially misleading statements and therefore asserts the trial court erred in denying his motion to suppress evidence seized during the search. "A trial court's finding on whether the

[4]Because we conclude that the exigent circumstance concerning destruction of evidence supports the trial court's decision, we need not address Crawford's argument that any difficulty Officer Fenoglio might have had in controlling Ditka created the exigent circumstance of officer safety.

affiant deliberately included misstatements of the law or excluded material facts is a factual determination, upheld unless 'clearly erroneous.'" *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991), *quoting United States v. Fawole*, 785 F.2d 1141, 1145 (4th Cir. 1986).

¶12 Challenges to warrant affidavits generally involve a two-step process. *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978); *see also Buccini*, 167 Ariz. at 554, 810 P.2d at 182. First, the defendant must establish by a preponderance of the evidence "that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false [material] statement in the affidavit." *Buccini*, 167 Ariz. at 554, 810 P.2d at 182. Then, if the court finds that the affiant made a false material statement, the court removes that statement and determines whether sufficient probable cause remains. *Id*. If the warrant application lacks probable cause after the improper statements are removed from consideration, all evidence seized under the warrant is excluded. *Id*.

¶13 Before searching Crawford's grandmother's home, police applied for and received a telephonic search warrant. In obtaining the warrant, Detective Dorer testified telephonically that A. "led [officers] to the house" in question. Dorer also testified that Officer Fenoglio subsequently discovered Crawford in the backyard of the house and detained him. Dorer then stated that A. positively identified Crawford as her attacker. He did not state, however, that A. had stated "I know that was him. I bet you that was him" before Officer Fenoglio brought Crawford out for identification.

¶14 Crawford first contends that Detective Dorer "recklessly withheld key information" during his search warrant application by failing to inform the judge issuing the warrant that A. was uncertain about which exact house had been the scene of the assault and had said that "the presence of a swing [in the house's yard] would show if she had in fact found the

house." But Detective Dorer stated that A. led the officers to the house and had described a swing in the backyard. A. also testified that she was certain about the location of the house. Any "[o]ther information that [Crawford] would have added to this affidavit was not significant to the finding of probable cause, and its omission was therefore not misleading." *See State v. Nordstrom*, 200 Ariz. 229, ¶ 44, 25 P.3d 717, 733 (2001).

¶15 Crawford also argues that Detective Dorer recklessly withheld information when he did not inform the judge that A. had said Crawford was her assailant before Crawford was ever removed from the backyard and presented for identification. But Crawford did not challenge this statement below, and he has therefore forfeited the right to seek relief for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). And because Crawford does not argue on appeal the error was fundamental, and because we, in any event, find none, the issue is waived. *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (fundamental error argument waived on appeal when not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it). Moreover, even if Crawford had not waived this argument, A. positively and unequivocally identified Crawford as her assailant when he was presented to her several minutes later. The fact that A. might have muttered her opinion that Crawford might be in the yard being searched does not invalidate her later positive and unequivocal identification.

¶16 Crawford finally contends, however, that Detective Dorer recklessly withheld information when he failed to inform the judge that Crawford's physical appearance "did not match key parts of [A.'s initial] description." But, as we have already explained, A. clearly identified Crawford as her attacker when she stated "[t]hat's him, that's him." Omitting the fact that A. might have described Crawford somewhat differently during another police interview did

not serve to mislead the judge. We conclude the trial court did not err in denying Crawford's motion to suppress evidence obtained from a search of Crawford's grandmother's home.

Motion to Sever

¶17 Crawford next argues the trial court erred in denying his pre-trial motion to sever the trial of the offenses involving the first victim, D., from those involving A. We review a trial court's denial of a motion to sever for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶18 Charges may be joined in an indictment if they are: (1) "of the same or similar character"; (2) "based on the same conduct or . . . otherwise connected together in their commission"; or (3) "part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). When charges are joined under Rule 13.3(a), the trial court will grant a motion to sever one or more from the others only if severance "is necessary to promote a fair determination of the guilt or innocence of [the] defendant of any offense." Ariz. R. Crim. P. 13.4(a). If the charges are joined only by virtue of being "of the same or similar character" under Rule 13.3(a)(1), however, the defendant is entitled to severance as a matter of right, "unless evidence of the other offense or offenses would be admissible . . . [even] if the offenses were tried separately." Ariz. R. Crim. P. 13.4 (b).

¶19 Crawford asserts that he was entitled to severance as a matter of right. But, he would be entitled to severance as a matter of right if his charges were joined by virtue of being of the same or similar character pursuant to Rule 13.3(a)(1).[5] Crawford does not cite to nor can we

[5]In its response below, the state argued in part that the charges should not be severed because they were connected in their commission and demonstrate a common scheme or plan. The trial court denied the motion to sever without comment. In its answering brief, the state again claims the offenses were "intertwined" and properly tried together under Rule 13.3(a)(2).

find any evidence in the record, however, demonstrating that his charges were joined under this subsection. To the contrary, the nature of Crawford's offenses makes them potentially joinable pursuant to two different subsections of Rule 13.3—subsections (a)(1) and (a)(2). And because "[j]oinder was clearly warranted under [R]ule 13.3(a)[(2),] . . . [Crawford] was not entitled as of right to severance and we find no abuse in the trial court's denial of his motion to sever." *See State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984); *see also State v. Tipton*, 119 Ariz. 386, 388, 581 P.2d 231, 233 (1978) (concluding that because joinder warranted under various subsections of Rule 13.3, appellant not entitled to severance as a matter of right). The trial court did not err in denying the motion to sever.

Peremptory Strikes

¶20 Crawford finally contends the trial court erred by denying his *Batson* challenge of the state's peremptory strike of a Hispanic juror. "When reviewing a trial court's ruling on a *Batson* challenge, we defer to its factual findings unless clearly erroneous, but review its legal determinations de novo." *Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d at 793.

¶21 Peremptory strikes of jurors based upon race are prohibited under the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). A challenge of a peremptory strike under *Batson* involves three steps.

> First, the party challenging the strike must make a prima facie showing that the strike was based on race. Second, the party making the strike may then offer a race-neutral explanation. That explanation "must be more than a mere denial of improper motive, but it need not be 'persuasive or even plausible.'" Third, the party challenging the strike must persuade the trial court that the proffered race-neutral explanation is pretextual.

Yet in his opening and reply brief, Crawford relies solely on severance as a matter of right for charges joined under Rule 13.3(a)(1).

Gay, 214 Ariz. 214, ¶ 17, 150 P.3d at 793, *quoting State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162 (App. 2001) (citations omitted). During the third step of a *Batson* challenge, "the trial court evaluates the credibility of the state's proffered explanation, considering factors such as 'the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.'" *Id*., *quoting Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (omissions in *Gay*). And because the third step is fact intensive, we defer to the trial court's determination. *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845.

¶22 During jury selection, Crawford challenged the state's peremptory strikes of Hispanic venireperson Tellez.[6] The prosecutor offered the following reasons for striking Tellez: (1) Tellez was young and inexperienced and (2) Tellez watches certain television shows that evidence a lack of "maturity and understanding of worldliness that's important in this particular case." The trial court ruled that the state's explanation was race-neutral and not purposeful[7] and denied Crawford's *Batson* challenge.

¶23 Crawford contends that the trial court erred in finding the state's explanations to be race-neutral because "another prospective juror, [Nunez,] also with an Hispanic surname . . . also stated he watched [one of the same television shows as Tellez], but was not stricken, and

[6]Crawford also challenged the state's peremptory strikes of several other potential jurors but only disputes juror Tellez's disqualification on appeal.

[7]In doing so, the trial court implicitly found that Crawford had made a prima facie case under step one of *Batson*. *See Gay*, 214 Ariz. 214, n.4, 150 P.3d at 793 n.4 (presuming trial court found defendant made prima facie case when trial court asked state to explain reasons for its strikes). The state does not appear to challenge this implicit finding and because the prosecutor subsequently offered an explanation for her strikes, the issue is moot, in any event. *Id.*

actually served on the jury." Crawford also claims the trial court erred because "the state used four of its six peremptory challenges to strike minorities, . . . so statistics also demonstrate discrimination." But once the trial court determined that the state's explanation for striking Tellez was race-neutral, Crawford never attempted to persuade the court that the explanation was pretextual, as required by *Batson*. The record supports the trial court's determination, and we defer to it. *See Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. Accordingly, the trial court did not err by denying Crawford's *Batson* challenge as to venireperson Tellez.

Conclusion

¶24 For the foregoing reasons, Crawford's convictions and sentences are affirmed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge